Finally, replacement cost and fair market value was already rejected by the Commission as not applying to poles in the Alabama Power Commission order, Tab 48 of our binder. Replacement costs are called particularly unsuited for valuing pole attachments, Paragraph 53. The Commission rejected any notion of fair market values being applicable to pole attachments at the same time, saying there's no non-monopoly market in pole attachments, Paragraph 55.

The Commission went on to say, Paragraph 57, why replacement costs could not be used to value pole attachments, and among the reasons are that a pole attachment does not displace the utility or prevent it from licensing additional users.

So Gulf has no basis here for distinguishing these binding Commission findings rejecting replacement costs. It might argue that the Commission has made these rulings before we attempted to show full capacity or, in fact, crowding, but as we just noted, what did Mr. Spain, their expert, say? The replacement cost has nothing to do with full capacity.

And Mr. Spain did not consider these Commission rulings at all ,a nd his failure to do so is one major reason, along with the others set forth in our pretrial brief, why we renew our challenge to Mr. Spain's testimony.

So, in sum, the issue in this case is can Gulf prove a legal right under a takings theory to compensation greater than marginal cost, but there was no testimony about what its marginal costs were except Ms. Davis' distortion of the definition.

She said marginal costs are not the costs that are caused by cable attachment, but the cost for Gulf completely independent of who is on a pole to go out and buy a new pole and replace today the equivalent of space occupied by an attacher. Ms. Davis admitted she doesn't know what the actual incremental expenses are that are caused by my four clients, and Mr. Spain said he had, quote, no idea what Gulf's marginal costs are.

This is key because the whole proceeding was intended to see if they could meet the APCO test to sustain a claim for loss or damage in excess of

marginal cost, but they don't even know what their marginal costs of Complainant's attachments are. And since they have no loss and don't even argue in their proposed findings actually for a specific rate; they say, "Oh, leave it to the parties to negotiate." Well, that backing away from the 40-60 rate, Your Honor, is very significant. Indeed, it's consistent with their reliance on a hypothetical loss because they cannot argue for a specific replacement cost rate with no loss to substantiate it.

There are no damages or loss for Gulf to measure, and therefore no entitlement for loss or damages in excess of marginal costs in this case.

Thank you, Your Honor.

CHIEF JUDGE SIPPEL: Okay. Mr. Campbell, five minutes.

MR. CAMPBELL: All right. I'm going to start with the last point. We're not backing away at all, Your Honor. We're trying to be reasonable.

In a free market you negotiate. We've offered them the opportunity to negotiate. If they want to stick with the 40-60, we're perfectly content

to collect it. That is just outright misdirection on their part that should not be countenanced to.

Let's hit a few points. They cite Clay v. Humana for the proposition that our lost opportunity to go out and lease two others, an important distinction, not them at a higher rate, is important. Let's read the case.

"The disclosure also did not deprive the AMA of the opportunity to sell its intellectual property at its market price to any willing buyers." Okay?

That is exactly what we're talking about. They have misrepresented the Clay v. Humana case.

They say that we have ignored the legal principle announced in Alabama Power. No, sir, we have not. What we have said is that we embrace the legal principle, that is loss to the owner, but when you reach the point of rivalry, just like the Alabama court said, you have reached congruence that loss to the owner is your fair market value of the property.

What did they say? A power company whose poles are not full can charge only the regulated so

long as the rate is above its marginal cost. But a power company whose poles are, in fact, full can seek just compensation. Just compensation is fair market value, willing buyer, willing seller.

We have shown a market. They keep going back to the Commission's finding there was no market. There is now. There's evidence in this proceeding. We've proven it. It's there. So we get it.

Let's go to the congruity issue. Back to Alabama Power, and this is the Metropolitan case they referenced, Mr. Cook referenced, earlier. They compared poles to the railways at issue in the Metropolitan case, and they said is the possibility of crowding is perhaps more likely in the context of pole space, however, and if crowded -- there's that word again -- pole space becomes rivalrous.

If it's rivalrous, it's just like land. It's the same analysis. All of this stuff about loss, misdirection. We have proven a loss. It is the value of the property.

All right. Let's talk about --

CHIEF JUDGE SIPPEL: The value of the

property --

MR. CAMPBELL: Is value of the property.

CHIEF JUDGE SIPPEL: -- is the loss.

MR. CAMPBELL: -- is the loss, the lost opportunity to lease to others in unregulated rates, the fair market value rates, and we will show higher value uses in must a moment. I'm going to get to that point.

Quickly, Osmose. This is another one of those "so what?" points. They make a big deal that they only measure for crowding, not full capacity. Osmose's information is not important for the legal significance of crowding versus full capacity. It's important for the objective criteria.

They went out and stuck a stick on poles and made some measurements. We introduced the evidence in this proceeding, and this Court determines what the relevance or significance from a legal perspective is.

It doesn't matter what label they put on it, and again, Mr. Haroldson used the same measurements when he talked about sources of crowding

earlier. That is just a huge red herring.

Order of attachment, that Osmose didn't look at the order of attachment. Nowhere in the 11th Circuit opinion does it say you have to prove whose fault the crowded condition is. It's not in there. There's a snapshot. Is that pole crowded? If it's crowded, it's rivalrous. If they take it when it's rivalrous, they pay just compensation. It is a red herring that we only surveyed Pensacola only.

What are they failing to point out when they make that statement? They're failing to point out that Mr. Bowen testified that Pensacola is exemplary of their entire service area. This is not a rural area. It's Panama City. It's Pensacola. They're cities. It's just like the other areas in their service territory.

What else? Let's keep going.

They say we come here with nothing regarding higher valued use. Not true. Eric, can you pull up that slide?

We did come in with signed contracts. We came in with our signed contracts. We came in with

their signed contracts. So we didn't come here with nothing.

What are the higher valued uses? Our witnesses talked about streetlights, transformers, increased service capacity. They, in fact, admitted that we were potential competitors of theirs, that the whole reason they get mandatory access is because anti-competitive. You guys might compete. You might become a cable company. You might become a telecommunications provider.

Ms. Kravtin testified to that. Competition is a higher valued use, and the opportunity, of course, we've mentioned to rent to others consists of Clay, consists of takings jurisprudence.

Let's go on. This concept of exclusion. I am delighted to hear that Mr. Cook and I agree on something: that Ms. Kravtin, indeed, testified that exclusion is the touchstone of rivalry, and she also testified, as I showed you earlier that make ready is the methodology by which you avoid exclusion.

So it is crystal clear then that if you

have to perform make ready, it's a rivalrous condition on the pole. That we agreed about.

I want to talk about one last thing that I think captures all of this, and it is Ms. Kravtin's allusion to a parking lot, similar to the elevator analogy that you used. And I think this will flesh a point home.

I was walking down the street the other day here in D.C. and walked by a parking lot, and there was a little tripod sign out in front of the parking lot that said "full," the parking lot full. And I looked at it and I thought, "You know, not according to Complainants' definition of full," because according to Complainants you can go in, you could repaint the stripes, move the cars a little closer together and make a few more spaces.

And if that doesn't work, then do you k now what? I looked up, and there was a building on one side, a building on the other, but nothing above. You could just stack some more layers of the parking deck up there. That's what they're trying to capture here.

That's not at full capacity. That's not crowding. That's not a meaningful analysis, and that is not what the 11th Circuit meant. They're looking at a different 11th Circuit case, reading requirements in that case that do not exist.

Quantifiable, identifiable buyer, and, Your Honor, you picked up on this and asked him a salient question: does the 11th Circuit say you have to do all of that?

The answer is no. Nowhere in that opinion does it say that. What it does say is that consistent with regular takings law, once you reach rivalry, you're looking at real property, a pole, congruous to land, and you look at a hypothetical buyer, a hypothetical lost opportunity, a lost opportunity that can be quantified by your inability to go out and sell that space to someone else at a market rate.

What they're attempting to do is turn this on its head. They want to flip takings law and say, "No, let's not talk about the real property. Let's talk about hypothetical property, a pole that might exist in the place of the pole that's there now, and

we want you to find a real buyer. Bring him in. We want to interview the management and we want to look at their business plans. We want to see if they're really viable."

That is nowhere in takings jurisprudence. To go down that road would be to change hundreds of years of precedence. It's ridiculous.

Let's go to the last page because this is really demonstrative. Where do they want to take us?

CHIEF JUDGE SIPPEL: One last point.

MR. CAMPBELL: This is my last slide, Your Honor.

CHIEF JUDGE SIPPEL: -- your time.

MR. CAMPBELL: They want to take us on a road to nowhere. They have twisted takings jurisprudence, added things into the 11th Circuit's analysis to insure that we never get past the cable rate.

What do I mean? Here's their analysis. Is there currently room for another attacher on the pole? If there is, you only get the cable rate. If there's not, then let's ask can make ready be

performed.

If it can, you only get the cable rate. If it can't, then I want to see your actual buyer waiting in the wings. Okay? And if you can't show me John Brown ready to pay you something, then you only get the cable rate.

If you can show me John Brown, did you check him out? Is he competent? Does he have the money to comply with the contract? Have you negotiated all of the terms of the contract? Have you checked his resume, his background?

That's what they say. That's what Ms. Kravtin says. If you didn't, you only get the cable rate, and if you did -- and this is the important point -- their stacking of inferences in that last paragraph I referenced, even if you did all of this, that negotiation you get into, it must be a monopoly rent anyway because any time you get more than the cable rate from anyone, it's leveraged. It's compulsion. It's a monopoly rent.

That's what they want you to sign off on in Paragraph 513. So the end game for them is we just

never get it.

That is not what the 11th Circuit meant. IT's not what Judge Tjoflat meant. That's not how you interpret that standard. I t just can't work.

Thank you, Your Honor.

CHIEF JUDGE SIPPEL: Okay. Thank you.

You have --

MR. COOK: Five minutes?

CHIEF JUDGE SIPPEL: Well, you've got six minutes.

MR. COOK: Thank you, Your Honor.

Your Honor, I want to distill my longer presentation to the core elements.

The 11th Circuit said they already get much more than their marginal costs and they get just compensation. It said fair market value is inapplicable. An alternative must be used.

So then it set forward a specific standard, and it said to get more you have to prove these things, full capacity and the lost opportunity through the buyer waiting in the wings or the higher valued use.

Whatever Your Honor thinks of the parties' differing sides about crowding, full capacity, one thing is clear. They sure haven't come forward with a buyer waiting in the wings that couldn't be accommodated, that was that missed or foreclosed opportunity. They sure haven't come forward with any sort of rudimentary analysis saying, "You're on such-and-such a space. We should have been able to use that. We wanted to put in some transformers here. We lost out on a higher valued use." You don't see any of that.

There simply is no loss, and one thing Mr. Campbell loves to say, and in fact, if you go back and look at the history of the briefs that we've cited in footnotes and what have you is this should all be about land. Let's get to land. Let's get to congruence to land by showing only the first element of the APCO test.

None of that is in the APCO opinion. The APCO opinion said this is not like land. Poles may be for practical purposes non-rivalrous and we have to use an alternative, and then it went forth and it said

is there a missed opportunity. Did you suffer something where you couldn't rent to someone?

And it set up this two pronged test. Things are full. People had to be excluded, and you lost as a result. You either lost a third party or you lost your own internal use. There was no loss, and fair market value does not apply.

Even if hypothetically they had come forward and shown they met the two APCO prongs, you don't jump to fair market value. APCO said you don't. An alternative must be used. You measure the amount of the loss. That's the core principle in this case: loss to the owner that John J. Felin & Co. cited in APCO says you have the burden to show the loss and to prove the amount of the loss.

And in this case there is simply no proof that they could not accommodate somebody, and in the absence of that proof, they already get more than they're entitled to under the Constitution.

That's what I think Your Honor has to keep in mind when you're thinking, well, what's fair in this case because Mr. Campbell say Complainants have

set an unmeetable test. We're going to keep chasing our tails.

That is utterly irrelevant because they're already given just compensation unless they come forward with proof of a loss, either the third party who couldn't get on or their higher valued use.

The pole attachment agreements that Mr. Campbell referred in his rebuttal a moment ago to at Tab 62 through 65 of his binder, those are all instances of things where either unregulated parties or parties who didn't enforce their rights to the FCC because, as he highlighted, they have leverage and they can say, "Pay us this or you won't get on."

Those people have all been successfully accommodated. That's the difference. Nobody came to them, said we want to get on, and they said, "Sorry. You know, those four cable companies are on. We can't help you."

In the end, I come back to the main principle. The most important word in this case is "loss." Gulf had to prove a loss. It has not.

Thank you, Your Honor.

CHIEF JUDGE SIPPEL: Thank you.

Ms. Lien, anything?

MS. LIEN: We don't have anything, Your Honor.

CHIEF JUDGE SIPPEL: Awfully quite. I was hoping after -- I mean, the arguments were certainly articulate and full and complete and covered anything that certainly I could conceive of covering, and I was hoping that after hearing it that I wouldn't have to go and read the rest of the briefs, but I'm afraid I'm going to have to do that. This has been very educational for me, very informative, and fortunately I will have the transcript of the arguments also.

So that concludes it. Your next offering or your next filing is with respect to the reply findings. Let's see. Those come in on August 16th.

MR. SEIVER: That's our understanding, Your Honor.

CHIEF JUDGE SIPPEL: Okay, and I think what I'll do is set something down in early September for a short admission session on your composite evidence.

MR. COOK: Deposition excerpts.

CHIEF JUDGE SIPPEL: Exactly right, and that's true on the confidential documents which come in in sealed envelopes.

I still am troubled having given you further guidance with respect to the documents that have been marked as being confidential, which really shouldn't have been.

MR. CAMPBELL: We're going to clean that up, Your Honor, that week following or within that two-week period following the submission of the reply comments.

CHIEF JUDGE SIPPEL: Yeah.

MR. CAMPBELL: We anticipate having a session up here jointly to address that issue, and we will clean it up consistent with your advice.

CHIEF JUDGE SIPPEL: Well, that shouldn't involve me.

MR. CAMPBELL: Right. No, no, I don't think you would have to.

MR. COOK: I thought when you said have a session you meant a session that His Honor is talking

about for just after Labor Day.

CHIEF JUDGE SIPPEL: No.

MR. CAMPBELL: I think we have to do both.

MR. COOK: Right, but in court we have to do the --

MR. CAMPBELL: Correct. We need to have one outside the presence of the Judge to clean up the documents and make sure we have all of our ducks in a row from an evidentiary perspective, and then we have to have one with the Judge to formally introduce the composite deposition exhibits into evidence.

CHIEF JUDGE SIPPEL: That's right, and to receive back, to substitute the sealed manual for what's in the record now.

MR. CAMPBELL: Correct.

CHIEF JUDGE SIPPEL: All right. I commend counsel. Can't ask for anything more.

PARTICIPANTS: Thank you, Your Honor.

CHIEF JUDGE SIPPEL: It's 20 of 11, and we're in recess until my further order.

Thank you very much.

(Whereupon, at 10:41 a.m., the matter was adjourned.)

CERTIFICATE OF REPORTER, TRANSCRIBER, AND PROOFREADER

FLORIDA CABLE TELECOMMUNICATIONS ASSOCIATION, ET AL.

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Place of Hearing

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Date of Hearing

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